80-522

Supreme Court, U. S.
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No. .....

In the Supreme Court of the United States

October Term, 1980

FIRST AMERICAN NATIONAL BANK
OF NASHVILLE,
Petitioner,

vs.

CHARLES A. SCARBORO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLIAM N. OZIER
Counsel of Record
2700 First American Center
Nashville, Tennessee 37238
Attorney for Petitioner

Of Counsel:
BASS, BERRY & SIMS
2700 First American Center
Nashville, Tennessee 37238

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED

Whether this Court's decision in *Lorillard v. Pons*, 434 U.S. 575 (1978) holding that a Plaintiff in an action brought under the Age Discrimination in Employment Act, 29 U.S.C. §§621 *et seq.*, is entitled to a jury trial, and/or the 1978 Amendment to the Act providing for a jury trial, should be applied retroactively to cases previously tried with a jury and decided before that decision and amendment but pending on appeal at the time of the issuance of the opinion in *Lorillard*.

PARTIES

All parties to this proceeding are set forth in the caption.

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No. .....

In the Supreme Court of the United States

October Term, 1980

FIRST AMERICAN NATIONAL BANK
OF NASHVILLE,
Petitioner,

vs.

CHARLES A. SCARBORO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

First American National Bank of Nashville petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the District Court. (Appendix A, *infra*, pp. A1-A8 is not officially reported). The opinion of the Court of Appeals (Appendix B, *infra*, pp. A10-A11) is reported at 619 F.2d 621. The Order of the Court of Appeals denying the Petitioner's Motion for Reconsideration is not officially reported. (Appendix C, *infra*, p. A12).

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1980. The Order denying the Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was entered on July 7, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The relevant portion of the Age Discrimination in Employment Act, as amended in 1978, provided as follows:

> "(2) In an action brought under Paragraph (1) [29 U.S.C. §626(c)] a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought . . . ." 29 U.S.C. §626(c)(2).

Prior to the 1978 Amendment to the Act, which became law on April 6, 1978, Section 626(c) was silent as to the right to a jury trial.

STATEMENT OF THE CASE

This case presents a significant question in the administration of the Age Discrimination in Employment Act, as amended, 29 U.S.C. §621 *et seq.*

This case was filed in the United States District Court for the Middle District of Tennessee on January 31, 1977, under the Age Discrimination in Employment Act (hereinafter referred to as the "ADEA"). The Plaintiff contended that he was unlawfully terminated by the Defendant because of his age in violation of the ADEA. On February 7, 1977, the Petitioner First American National Bank of

Nashville (the Defendant below) filed a Motion to Strike the Plaintiff's request for a jury which was contained in the Complaint. On March 30, 1977, pursuant to the Sixth Circuit's opinion in *Morelock v. N.C.R. Corporation,* 546 F.2d 692 (6th Cir. 1976), the District Court entered an Order granting the Defendant's Motion.

The case was tried to the United States District Court for the Middle District of Tennessee without a jury on November 29 and 30, 1977. The Court entered a Memorandum Decision and Judgment for the Defendant on the merits on November 30, 1977. (Appendix A, pp. A1-A8). On December 4, 1977, the Plaintiff filed a timely Notice of Appeal to the United States Court of Appeals for the Sixth Circuit from the District Court's Decision.

This Court announced its decision in *Lorillard v. Pons,* 434 U.S. 575 (1978) on February 22, 1978. Public Law 95-256 amending the ADEA was passed by the Houses of Congress on March 21 and 23, 1978, respectively and signed by the President on April 6, 1978. 92 Stat. 189.

The record in this case was transmitted to the United States Court of Appeals for the Sixth Circuit by the Clerk of the United States District Court for the Middle District of Tennessee on February 14, 1978. The Plaintiff's Brief as Appellant was transmitted to the United States Court of Appeals for the Sixth Circuit on April 5, 1978. The Defendant and Petitioner's Brief as Appellee was transmitted to the Court of Appeals on May 26, 1978. The Plaintiff's Reply Brief was filed with the appellate court on July 3, 1978. The denial of a trial by jury was not raised by the Plaintiff either in his initial brief or in his reply brief. The first mention of the jury trial issue was contained in a Supplemental Memorandum of Authorities filed by the Plaintiff with the Sixth Circuit on or about January 31, 1980.

On May 9, 1980, the United States Court of Appeals for the Sixth Circuit issued its decision, holding that this Court's decision in *Lorillard v. Pons* should be applied retroactively and, therefore, directing that this case be remanded to the United States District Court for the Middle District of Tennessee for a trial by jury pursuant to 29 U.S.C. §626(c)(2). The Sixth Circuit held that the ADEA should be applied by the Court as it existed at the time of the appeal, since the Court found that to do so would not "result in manifest injustice" and that there is no "statutory direction or legislative history to the contrary."

The Petitioner's Petition for Rehearing and/or Suggestion for Rehearing En Banc was denied by the Court by Order entered on July 7, 1980.

REASONS FOR GRANTING THE WRIT

1. The decision of the Sixth Circuit Court of Appeals in this case decides an important question of Federal law which has not been, but should be, settled by this Court as to the retroactive application of this Court's decision in *Lorillard v. Pons* and/or the retroactive application of the 1978 amendment to the Age Discrimination in Employment Act extending the right to a trial by jury to cases brought under that statute.

2. The decision of the United States Court of Appeals for the Sixth Circuit in this case, finding that the holding in *Lorillard v. Pons* should be applied retroactively, decides a Federal question in a way which is in conflict with applicable decisions of this Court regarding the retroactive operation or application of appellate decisions. In determining whether or not its decisions should have retrospective operation, this Court has established three factors to be considered:

(1) whether the decision to be applied established a new principle of law either by overruling clear past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed;

(2) whether the purpose and effect of the rule in question will be furthered by retrospective operation of that rule; and

(3) whether retroactive application could produce substantial inequitable results.

Chevron Oil Co. v. Huson, 404 U.S. 97, 106-7 (1971).

Retrospective application of the *Lorillard* decision is not necessary to implementation of the holding in *Lorillard*. The *Lorillard* decision clearly overruled past precedent in the Sixth Circuit Court of Appeals represented by the Court's decision in *Morelock v. N.C.R. Corporation*, 546 F.2d 682 (6th Cir. 1976). The Court's decision in *Lorillard* was not clearly foreshadowed since there was disagreement among the circuit courts of appeals as to the right to jury trial in cases brought under the ADEA;[1] and Congress itself, recognized the necessity to amend the Act if a right to jury trial was to be assured.

One other factor considered by this Court to be most important in deciding whether or not to apply its decision retroactively is the effect which retroactive application of the new rule would have upon the administration of justice. *See, DeStefano v. Woods*, 392 U.S. 631, *reh. den.*, 393 U.S. 898 (1968); *Stovall v. Denno*, 388 U.S. 293 (1967); *Linkletter v. Walker*, 381 U.S. 618 (1965).

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1. *Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1022 (1977) (right to jury trial); *Pons v. Lorillard*, 549 F.2d 950 (4th Cir. 1977), *affirmed*, 434 U.S. 575 (1978) (right to jury trial); *Morelock v. N.C.R. Corporation*, 546 F.2d 682 (6th Cir. 1976), *vacated*, 435 U.S. 911 (1978) (no right to jury trial).

In *DeStefano v. Woods,* the Court held that a new rule providing a right to trial by jury in serious contempt cases should not be applied retroactively because of the substantial adverse effect on the administration of justice which would be occasioned by invalidating all serious contempt convictions which had not been decided by a jury. In holding that the right to jury trial in such cases should not be applied retroactively, the Court stated:

> "As we stated in Duncan, 'we would not assert, however, that every criminal trial - or any particular trial - held before the judge alone is unfair or that a defendant may never by as fairly treated by a judge as he would be by a jury.' 391 U.S. at 158, 20 L.Ed. 2d at 501. The values implemented by the jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial. Second, States undoubtedly relied in good faith upon the past opinions of this Court to the effect that the Sixth Amendment right to jury trial was not applicable to the States. E.g., *Maxwell v. Dow,* supra. Several States denied requests for jury trial in cases where jury trial would have been mandatory had they fallen within the Sixth Amendment guarantee as it had been construed by this Court. *See Duncan v. Louisiana, supra,* at 158, n. 30. 20 Ed. (sic) at 501. Third, the effect of the holding of general retroactivity on law enforcement and the administration of justice would be significant, because the denial of jury trial has occurred in a great number of cases in those states not until now accepting the Sixth Amendment guarantee."
>
> 392 U.S. at 633-4.

Retroactive operation of an overruling decision is neither required nor prohibited by the constitution, but

whether, and to what extent, a new rule will be given retroactive effect is a matter of judicial policy. *Linkletter v. Walker,* 381 U.S. 618, 628-0 (1965).[2]

3. The holding of the Sixth Circuit in this case that it must apply the law in effect at the time of its decision is not required by the decisions of this Court. The general rule is that a court is to apply the law in effect at the time of its decision "unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Board of City of Richmond,* 410 U.S. 696, 711 (1974); *Thorpe v. City of Durham,* 393 U.S. 268 (1969); *United States v. Schooner Peggy,* 1 Cranch 103, 2 L.Ed. 49 (1801).

When injustice could result (as "in mere private cases between individuals"), exceptions to the general rule have been made. *Bradley v. School Board of City of Richmond,* 416 U.S. at 716-7; *United States v. Schooner Peggy,* 1 Cranch at 110. This Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a matured or unconditional right. *Bradley, supra* at 720.

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2. In the only two cases decided since *Lorillard* in which the question of a Plaintiff's right to jury trial was determined based on the timing of the Plaintiff's request, jury trials were denied. In *Sutton v. Atlantic Richfield Co.,* ..... F.Supp. ....., 20 FEP Cases 1292 (C.D. Cal. 1978) the Court held that the Plaintiff had failed to file a timely demand for a jury trial in accordance with Rule 38 where the Plaintiff filed a demand forty-four (44) days after the Supreme Court's decision in *Lorillard.* In *Tonka v. AT&T Co.,* ..... F.Supp. ....., 20 FEP Cases 539 (N.D. Ga. 1978), the Plaintiff filed a request for jury approximately ten days after this Court's decision in *Lorillard.* The Plaintiff's action had been pending for approximately three years at that time. The District Court found that the Plaintiff in *Tonka* had also waited too long to request a jury and, therefore, refused to transfer the case from the non-jury calendar to the jury calendar.

Although there are no "matured or unconditional" rights involved in this case, the holding of the Sixth Circuit imposes upon the Defendant the burden and expense of a second trial in an action already determined on its merits. Such a result imposes an unnecessary burden not only on the Defendant but on the District Court as well, and is not required to effectuate the purposes of the ADEA or of the Court's holding in *Lorillard v. Pons.*

4. A determination that this Court's decision in *Lorillard v. Pons* should not be applied retroactively is required to avoid the creation of a burden on the administration of justice through the reopening of many age discrimination cases which were tried without a jury prior to this Court's decision in *Lorillard,* but which were still pending review by appellate courts at the time of the rendition of this Court's decision and the subsequent amendment to the Act. The Petitioner submits that the Sixth Circuit's holding applying this Court's decision in *Lorillard* retrospectively will create a serious burden on the district courts through the relitigation of cases which have already been tried on the merits.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM N. OZIER
Counsel of Record
2700 First American Center
Nashville, Tennessee 37238
Attorney for Petitioner

Of Counsel:
BASS, BERRY & SIMS
2700 First American Center
Nashville, Tennessee 37238

APPENDIX A

(Filed November 30, 1977)

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 77-3053-NA-CV

CHARLES A. SCARBORO

VS.

FIRST AMERICAN NATIONAL BANK

MEMORANDUM

This Memorandum represents a transcript of the oral opinion delivered by the court from the bench at the conclusion of the trial of this action, together with some revisions and amendments. As such it constitutes the court's findings of fact and conclusions of law.

This action was brought under the provisions of 29 U.S.C. § 623(a) which prohibits age discrimination by an employer. The statute specifically says, and I will read the pertinent portions: "(a) It shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; . . . ."

In this case the burden of proof is on the plaintiff to establish by a preponderance of the evidence two things; first, that the change which was made in his position at First American National Bank did adversely affect him as set forth in the statute and, second, that the move was made because of his age.

I think it is necessary, first, to discuss the facts as they have been developed at the hearing and as they were stipulated by the parties prior to the hearing.

Mr. Scarboro was fifty-four years of age in 1976, and he had been an employee of the First American National Bank for about twenty-nine years. He had begun as a savings bookkeeper, had served subsequently as a savings teller, paying and receiving teller, chief teller, and then he was manager of proof transit and bookkeeping department. He served for a time as director of personnel, and, at the time of the change involved here, he was an administration group head and was a vice president of the Bank.

The divisions which reported to him as a group head were the comptroller, the audit, Master Charge, purchasing and building management.

In 1975, and possibly in 1974, the First American National Bank had suffered some severe financial problems. There had been some substantial losses as a result of real estate loans, and substantial increases had been made to the loss reserve of the Bank and of the holding company because of prospective losses in such loans. Accordingly, the management of the Bank determined that it was advisable to bring in a new chief executive officer, and Mr. Kenneth L. Roberts, who had previously been in a Nashville bank but had more recently been in a bank in Virginia, was brought to Nashville and was elected as President and Chief Executive Officer of both the holding com-

pany, First AMTEN Corporation, and of the Bank. He took his position about the first of February, 1976.

Apparently, he immediately determined that some rather drastic changes were necessary in the organizational structure of the Bank and began examining the various functions which were being performed by officials of the Bank. One of the things which apparently caught his eye was the fact that the group which had been assigned to Mr. Scarboro was, to say the least, not a homogenous group but one whose functions were really completely unrelated in many ways.

He determined, apparently then, that it was necessary to make a change in the assignment of the duties involved in this particular group, such items as Master Charge to be transferred to a division which would be set up, which would have primary oversight of the retail lending of the Bank, audit and comptroller to go in a different direction, and purchasing and building management to also be put under different heads.

In connection with this matter and at the same time the evidence clearly establishes that, since the move of the Bank from its old quarters on the corner of Fourth and Union to its new bank building, there had been many complaints because in the new building no senior officers were located on the main bank floor. In the old building, as testified to by several witnesses, all of the senior officers of the Bank were immediately available to customers who came into the Bank and then when they went to the new building the senior officers went to the—at least most of them went to the sixth floor and others to floors in the building above the main floor.

And so for quite some time prior to Mr. Roberts becoming the head of the organization there had been complaints from both customers and directors that there was no senior presence available on the first floor of the Bank. Appar-

ently the decision to place Mr. Scarboro in this position was first conceived by Mr. Roberts. He was looking for someone with experience, someone who was a senior officer of the Bank, and Mr. Scarboro was a senior officer of the Bank, being a vice president with many years' experience, someone who had experience in meeting the public, and Mr. Scarboro had for a number of years been used by the Bank in public relation activities in various positions.

He, therefore, determined that Mr. Scarboro should be placed in charge of the main floor of the Bank, which formerly had been a branch, considered as a branch of the Bank, along with the thirty-two other branches of the Bank.

In connection with this change, he determined that in order to give some importance to the main banking establishment in its new location that it should no longer be considered as one of the branches of the Bank but would be a separate division or entity with separate reporting away from the reporting of the other branches. As nearly as the Court can determine from the evidence in the case, Mr. Scarboro's reaction to this decision was not unfavorable. There is no evidence that he made any complaint that he thought he was being demoted in any way, and, apparently, the only question which he asked of anyone was asked of Mr. F. G. Cavin who was, on July 1, 1976, to become Executive Vice President of the Bank, if he would be demoted from the standpoint of his salary. He was assured that he would not.

Apparently about this time two things occurred to Mr. Scarboro; first, he has related that a table and four chairs were taken from the office which he had been occupying in his capacity as group head and were removed to the basement. There is no evidence that he made any inquiry as to why this had been done or who had

authorized its being done, and there is no evidence in the record that any responsible person in the First American National Bank had directed that this furniture be moved.

Also, in connection with the transfer of Mr. Scarboro's actual presence from his previous office to the main floor of the Bank, it was necessary for a transfer to be made of his telephone. The evidence is that there was a delay in the connecting of the new telephone and that it was not completed until July 12, 1976.

The evidence, however, is that the person responsible for having phone connections made placed an order with the telephone company on July 1, 1976, was given, apparently, an effective date of Friday, July 9, 1976, but the phone was not actually connected until Monday, July 12, 1976.

It also appears that one other person whose phone order was placed on that same day received his phone on July 7, 1976. Also, there were two other people who were, apparently, swapping offices whose phones were connected on the same day of the transfer, apparently as a result of a particular request that that be done.

There is no indication in the record that Mr. Scarboro made any particular request that his phone transfer be expedited, and there is nothing in the record to indicate that he made any complaint to responsible officials of the Bank as to the delays in making the phone transfer.

After he took his position as manager of the main office, the evidence shows that he apparently entered into the position with some enthusiasm, made some immediate changes in operations, small perhaps in their number but with some good effects; attended a seminar at the Bank's expense in connection with general banking duties, but, on or about July 26th, 1976, went to Mr. Andrew Benedict,

Chairman of the Board, and either told him that he was thinking about resigning or told him he was ready to resign. There is some conflict in the evidence with this particular event.

However, the Court finds that on that date he did communicate to Mr. Benedict his intention to resign; and he was asked to wait at least a day or some time, and then Mr. Benedict talked with Mr. Roberts and Mr. Roberts stated if he wanted to resign he should be allowed to resign, although Mr. Benedict told Mr. Roberts he thought he might be able to talk him out of it.

Accordingly, he did, on July 28, 1976, tender his written resignation from the Bank. There is nothing in the record to show what triggered specifically the move on July 26, 1976, by Mr. Scarboro to make this decision to go to see Mr. Benedict and talk to him about his resignation.

Now, in connection with the transfer of duties that occurred in connection with Mr. Scarboro, the Court finds that in his capacity as a group head he was in a level ten position which had a maximum salary possibility of $52,000 and, at the time of his transfer he was making slightly over $33,000, which was somewhat above the minimum for that range but substantially beneath the maximum. His new position was classified in the Bank's personnel program as a level six position which had a maximum salary of substantially less than the present salary of Mr. Scarboro, and the policy of the Bank as it had been understood by Mr. Scarboro in the past (and it seems to be the fact) was that an employee who went to a class where his salary already exceeded the maximum would not receive an increase absent a re-evaluation of the position.

The testimony in the case shows that no inquiry was made by Mr. Scarboro as to whether or not there would be a re-evaluation of the position and he was not advised

specifically that there would be a re-examination of the position. It does appear from the record that Mr. Roberts did plan a complete re-evaluation of all positions in the Bank and subsequently a re-evaluation was made of this particular position which resulted in the maximum set for it being placed at $40,000, which was substantially in excess of the salary Mr. Scarboro was receiving at the time of the transfer.

Although facially it might appear that the change of positions was a demotion, the Court is of the opinion that such change was of a parallel or horizontal nature and did not affect adversely Mr. Scarboro's position with the Bank.

Even if it be assumed, *arguendo,* that Mr. Scarboro was adversely affected by the move, the record shows, and the Court finds, that the transfer was not made "because of age." The record shows that Mr. Scarboro was underutilized in his position as a group head and that his actual duties were minimal. At the time Mr. Roberts decided to make this move he had been advised by Mr. Scarboro by letter dated January 29, 1976, that he was "bored" and that his duties "require[d] very little of [his] time."

It thus appears that the transfer was primarily to give Mr. Scarboro meaningful duties in connection with the upgrading of the main office and that he was selected for the position not because of his age *per se* but because of his senior status with the Bank and because of his maturity, wisdom and experience.[1]

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1. 29 U.S.C. § 623(f) provides:

"(f) It shall not be unlawful for an employer, employment agency, or labor organization—

"(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is

(Continued on following page)

The Court feels that on the slender reed of a statement made to Mr. Scarboro that some "maturity" was needed on the main floor and another statement that some "age" was needed there, this action was brought. In the context in which these statements were made the Court finds no indication of discriminatory purpose.

The Court has noted and feels it must say this, that in this case I believe that we have a situation of excessive sensitivity on the part of Mr. Scarboro to apparent slights which were not intended as slights, or at least the record doesn't show that they were. We also have, in the Court's opinion, some insensitivity on the part of the high bank officials in not specifically talking with Mr. Scarboro and explaining to him his possibilities for advancement in the future.

There was a statement made to him that they thought he could do a great job for the Bank there, that they believed they had some things in mind for that main office that he could accomplish, but there was no specific statement made to him that he would be considered for additional increases in pay or advancement in the future.

This is a sad case because it resulted in a man with valuable experience with the Bank giving up his position and losing many benefits to which he would have been entitled and it has likewise resulted in the Bank losing the benefit of a loyal and experienced employee. But from a legal standpoint, the Court must necessarily find that the plaintiff has not made out his case, and, therefore, judgment will be entered for the defendant.

/s/ Frank Gray, Jr.
Senior Judge

Footnote continued—

a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age; . . ."

(Filed November 30, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 77-3053-NA-CV

CHARLES A. SCARBORO

VS.

FIRST AMERICAN NATIONAL BANK

JUDGMENT

In accordance with the Memorandum contemporaneously filed, it is the Judgment of the Court that the plaintiff take nothing, that the action be DISMISSED on the merits, and that the defendant recover of the plaintiff its costs.

/s/ Frank E. Williams
Clerk

APPENDIX B

No. 78-1066

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES A. SCARBORO,
Plaintiff-Appellant,

v.

FIRST AMERICAN NATIONAL BANK OF NASHVILLE,
Defendant-Appellee.

ON APPEAL from the United States District Court
for the Middle District of Tennessee.

Decided and Filed May 9, 1980

Before: KENNEDY and MARTIN, Circuit Judges; and PECK, Senior Circuit Judge.

PER CURIAM. Plaintiff-appellant Charles Scarboro brought this action under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* On the basis of our decision in *Morelock v. NCR Corp.*, 546 F.2d 682 (6th Cir. 1976), the district court specifically denied Scarboro's request for a jury trial made at the time he filed his complaint.

Morelock, however, has been superseded by *Lorillard v. Pons*, 434 U.S. 575 (1978), in which the Supreme Court recognized a general statutory right to trial by jury in Age Discrimination in Employment Act suits. We acknowledged and adopted this rule in *Ott v. Midland-Ross Corp.*, 600 F.2d 24 (6th Cir. 1979).

The Act itself was amended two months after *Lorillard*. Section 70 now reads:

> (2) In an action brought under paragraph (1), [29 U.S.C. 626(c)] a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought . . . .

29 U.S.C. § 626(c)(2). *See Slatin v. Stanford Research Institute*, 590 F.2d 1292 (4th Cir. 1979).

The defendant, First American National Bank, contends that Scarboro waived his right to a jury trial and urges us to accept the substantive determination of the district court. Defendant points out that *Lorillard* was decided six weeks before plaintiff filed his brief on appeal and argues against retrospective application of that case, citing *Chevron Oil v. Huson*, 404 U.S. 97 (1971).

We are not persuaded by the defendant's arguments. The Supreme Court has held, and Congress has provided, that private litigants under the Act are entitled to a jury trial. We must apply the statute in its present form unless our doing so would result in "manifest injustice" or unless "there is statutory direction or legislative history to the contrary." *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974); *Hercules, Inc. v. EPA*, 598 F.2d 91 (D.C. Cir. 1978). In this case, neither limiting condition exists. The new legislation does not evince a nonretroactive scheme, and we do not believe that a jury resolution of plaintiff's claims poses any threat of "injustice" to either party.

Accordingly, we remand this case to the district court for a trial by jury pursuant to 29 U.S.C. § 626(c)(2).

APPENDIX C

(Filed July 7, 1980)

No. 78-1066

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES A. SCARBORO,
Plaintiff-Appellant,

v.

FIRST AMERICAN NATIONAL BANK
OF NASHVILLE,
Defendant-Appellee.

ORDER

Before: KENNEDY and MARTIN, Circuit Judges; and PECK, Senior Circuit Judge.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above styled case; and

No judge in active service in this Court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the Court's per curiam,

Now, therefore, the motion for rehearing is hereby denied.

Entered by Order of the Court

/s/ John P. Hehman
Clerk